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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 216

BYRON J. WALTERS,

Petitioner,

vs.

EDITH MAUD WILSON,

Respondent.

BRIEF OF RESPONDENT ON PETITION FOR
WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH DISTRICT.

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FOR THE NINTH DISTRICT.**

Statement of Respondent's Case.

Respondent respectfully prays that the petition herein be denied and in assigning her reasons therefor,

(1) Denies that the decision of the United States Circuit Court of Appeals, Ninth District, herein, is in conflict with any appellate local decisions, or with any decisions of the same court, on the same matter.

(2) Denies that said decision is in conflict with the decisions of other Circuit Courts of Appeals.

(3) Denies that said decision fails to follow applicable decisions theretofore rendered by the United States Cir-

cuit Court of Appeals, Ninth District, on the question of jurisdiction.

(4) Denies that any conflict has arisen on vital questions here involved since this Court decided the case of *Local Loan Co. v. Hunt*, 292 U. S. 234.

(5) Denies the applicability of the cases cited by Petitioner in his recital of "Reasons Relied on for Allowance of the Writ."

In re Skorcz, 67 Fed. (2d) 187. This case like the *Local Loan Co.* case involved a lien on future wages.

After the assignor had filed his petition in bankruptcy, the employer of the assignor filed suit in the Illinois State Court to determine what to do with the wages held under the assignment. Notice of the assignment had been served on the employer. The creditor in that suit claimed the wages under the assignment and the assignor also claimed said wages. Injunctions were then sought by the employer and by the assignor in the United States District Court, and the United States District Court made an order restraining the creditor from any action to collect on his assignment.

From this order the appeal of the assignee arose. The order of the District Court was affirmed.

We submit that the issues in the *Skorcz* case are not in any sense comparable to those in the present case and that the law in the *Skorcz* case decides nothing herein.

Sims v. Jamison, 67 Fed. (2d) 409. This case is likewise not in point. It decides no question here involved on the issue of jurisdiction. It does not determine that the District Court *must* exercise jurisdiction in all cases.

It determines that the Bankruptcy Court "*can and should declare the effect of and enforce state law if it has jurisdiction of a case in which state law is involved.*" (P. 410.)

Which is exactly what the Circuit Court of Appeals, Ninth District, did in the *Walters* case. It declared the effect of the decision of the California State Supreme Court in the *Wilson v. Walters* case.

Lowee v. California State Federation of Labor, 189 Fed. 714. This case does not hold that a Federal Court *must* interfere to set aside the decision of a State Court, even where a federal question is indirectly involved.

Holmes v. Rowe, 97 Fed. (2d) 537. This case does not involve the present issues at all and the question of the dischargeability of the debt was never submitted to a State Court by the bankrupt nor decided by a State Court. It was simply held that once the petition in bankruptcy is filed, the Federal Courts retain jurisdiction to pass on an application for an injunction and all other proper matters related to the case. The bankrupt never submitted the question involved to any Court of Appeal but, immediately after the Justice's Court had denied his petition for cancellation of the judgment, he applied to the Bankruptcy Court for an injunction.

SUMMARY OF RESPONDENT'S ARGUMENT.

Respondent's argument will be largely confined to answering the points presented by Petitioner's Brief.

In addition thereto Respondent stands squarely upon the decision of the Ninth District Court of Appeals herein, the text of which is before this Court in the Transcript [R. 132]. All italics are ours.

The following facts and proceedings as disclosed by the Record are basic and, we submit, decisive.

(1) The complaint upon which the claim and judgment here involved is based plainly states a complete cause of action for obtaining money by false representations. This is disclosed by an examination of the pleading itself [R. 28-44]. It is determined by the Supreme Court of California (19 Cal. (2d) 111).

(2) The judgment was by stipulation [R. 44-47].

(3) The judgment was renewed in August, 1937, upon default of the defendant [R. 50].

(4) The Petitioner, *Walters*, was, after adjudication, discharged as a bankrupt in August, 1939 [R. 2]; and the Petitioner listed Respondent's claim in his petition. Respondent did not file her claim nor prove the same in the proceeding.

(5) In May, 1940 [R. 5], Respondent levied garnishment on Petitioner's salary as Municipal Court Judge in Los Angeles under Section 710 of the California Code of Civil Procedure; whereupon the following proceedings and facts followed:

(a) Instead of applying to the Bankruptcy Court for an injunction, Petitioner appeared personally by affidavit in the Superior Court (a State Court) and opposed the garnishment and sought its discharge on three grounds:

First—That his office was a constitutional one and his salary was not, therefore, subject to garnishment.

Second—His discharge in bankruptcy.

Third—That his salary was necessary for the support of his family [R. 65].

- (b) The Superior Court granted his petition on the ground that he was a constitutional officer of California and that, as such, his salary was exempt from execution. The Superior Court also decided that the debt upon which garnishment was based was *not discharged in bankruptcy* [R. 65].
- (c) Petitioner did not appeal from that decision of the Superior Court nor from that part of the decision which found the debt not to be discharged.
- (d) The Respondent appealed from that part of the decision of the Superior Court which invalidated the garnishment on the ground that the judgment debtor was a State constitutional officer [R. 65].
- (e) Again, Petitioner did not apply to the Bankruptcy Court for relief but chose to further litigate the issues in the State Courts.
- (f) The State Appellate Court affirmed the Superior Court's decision on the ground that Petitioner was a constitutional officer of the State and that his salary for that reason was not subject to garnishment [R. 65].
- (g) The Respondent sought a hearing in the State Supreme Court.
- (h) Again the Petitioner did not apply to the Bankruptcy Court for relief and in December, 1941, the State Supreme Court reversed the Appellate Court's decision and also decided the other question raised by the Bankrupt's Petition on the garnishment proceeding in the Superior Court from which the appeal arose [R. 65].
- (i) Thereafter, Petitioner filed his petition for an injunction and to have the dischargeability of the debt herein determined, on December 23, 1941 [R. 3].

Pertinent Questions Bearing Upon the Record.

(1) Why did the Petitioner not seek injunction relief against the garnishment in the first instance?

There are several reasons which might have justified his course then as well as later—until the State Supreme Court rendered its decision. For instance:

He had three grounds to speculate with in the Superior Court in the garnishment proceeding, namely—

- (a) He might get a decision of the Superior Court that the debt *was discharged* in bankruptcy.
- (b) He might get a decision by that Court that as a State constitutional officer his salary was not subject to garnishment.
- (c) He might get a decision that all of his salary was necessary for the use of his family.
- (d) He might get all of these favorable decisions or part of them.

Whereas, if he went into the United States District Court he would have only one of these claims; namely, the dischargeability of the debt, to speculate on.

(2) If the debt was discharged by Bankruptcy, the assertion of all other grounds became unnecessary. Therefore, why did he follow the appeal through the State Courts which he now says was on the single constitutional question, all of which would have been unnecessary if, as he contends, the debt were discharged in bankruptcy? A simple proceeding in the Bankruptcy Court for injunctive relief would have sufficed *if the debt were discharged*.

(3) Can Petitioner defend against Respondent's garnishment on the three specific grounds and then claim that the one that is decided against him is *dictum*?

Argument.

Petitioner's argument is summarized on pages 33 to 35 of his Brief.

We shall follow his points in the order in which they appear in his Brief.

I.

Petitioner's first point involves the question, "Does the District Court have jurisdiction to consider Bankrupt's petition filed in the Bankruptcy Court?"

What relief did the Petitioner seek by that petition?

He sought two forms of relief:

- (a) An injunction against any attempt on the part of *Mrs. Wilson* to collect her judgment [R. 3].
- (b) An order determining the dischargeability of the debt of the Petitioner to *Mrs. Wilson* [R. 3].

The Referee *did* exercise the jurisdiction of the Bankruptcy Court and *denied the injunction* [R. 97-99].

The United States District Court affirmed that decision by the Referee on Petitioner's Petition for Hearing on the Referee's Certificate on Review [R. 105], but vacated the Referee's Findings.

The United States Circuit Court of Appeals, Ninth District, affirmed the action of the District Court but reversed the District Court's order Vacating the Findings [R. 133-135].

Several far-reaching developments appear from an analysis of this proceeding bearing upon the Bankruptcy Court's refusal to exercise jurisdiction.

First:

The Petitioner's Brief misses the issue raised by all of the tribunals which have passed upon it from the Referee to the Circuit Court of Appeals.

The question *never was*:

"Does the United States District Court have jurisdiction to pass upon the question involved?"

The only question discussed by any of the tribunals after the Referee decided that the Court did have jurisdiction, was:

"Should the Court exercise its jurisdiction?" [R. 69].

None of the opinions or orders herein attempted to hold that the Court *had no jurisdiction*.

The Referee, as stated above, declared in so many words that the Court *has jurisdiction* [R. 69].

The United States District Court affirmed the Referee's decision in that regard [R. 104].

Therefore, we shall not attempt to argue the question: "Did the Court have jurisdiction?"

Second:

The next fact that appears from an analysis of these proceedings is that the Bankruptcy Court by its decision, based on its Findings, to all intents and purposes accomplished all that a declaratory order could have accomplished.

It denied the injunction.

Of what purpose could an order declaring the debt non-dischargeable be, in the fact of the denial of the injunction?

Could the Court declare the debt *dischargeable* and at the same time *deny* the injunction? Manifestly not.

Therefore, the denial of the injunction was the legal equivalent of a declaration that the debt was non-dischargeable.

Why did the Referee, affirmed on appeal, deny the injunction?

Because the Supreme Court of California had declared the debt non-dischargeable?

Not at all.

The California Supreme Court case of *Wilson v. Walters* (19 Cal. (2d) 111) was not so construed by either the Referee or the United States District Court on review. The Referee's opinion is found on pages 61-79 of the Record.

The United States District Court in its order sustaining the Referee says:

“While on a question of substantive law we might substitute our judgment for that of a State Court, the determination that the judgment here involved was one in tort turns upon a question of California pleading. And the decision of the Supreme Court of California on the subject (*Wilson v. Walters*, 1941, 19C (2) 111) should be accepted as binding on the Bankruptcy Court.” [R. 104-105.]

The decision of the Supreme Court of California was considered by the United States District Court only in so far as it passed on the question of pleading, that is, whether the action was in tort or contract and whether the complaint stated a cause of action for obtaining money by false representations.

It held that the complaint stated a cause of action in tort and that it stated a complete cause of action on obtaining money by false representations.

The Referee's reason for declining to exercise jurisdiction becomes apparent from an examination of these proceedings.

The Referee's decision was not based upon a decision by a state court that the debt is non-dischargeable, but rather because the Supreme Court of California had declared *finally* that the complaint upon which the *judgment by stipulation* was based stated a complete cause of action in tort and for obtaining money by false representations; the Referee's decision took cognizance of the provision of the Bankruptcy Act that such a debt was not dischargeable.

If the Supreme Court of California was right in holding that the debt was one for obtaining money by false representations, then, automatically, the Bankruptcy Act renders the debt non-dischargeable (Bankruptcy Act, Sec. 17, Subd. 2).

The Bankruptcy Court by its refusal to exercise jurisdiction decided that the California Supreme Court was right in its decision.

Exercise of jurisdiction to declare the debt dischargeable or non-dischargeable thereby became unnecessary.

Moreover, had the Referee or the United States District Court undertaken to hold the debt dischargeable, such action would have been equivalent to a decision that the Supreme Court of California was without authority or qualification to pass upon the nature and sufficiency of its own California pleadings and causes of action.

Third:

The Petitioner herein demands an order declaring the dischargeability of the debt.

The Referee declined to so order.

What did the Referee do in that regard?

He made Findings of Fact which, among other matters covered, found as follows:

(1) That the debt was one for obtaining money by false representations [R. 89].

(2) That the debt is not dischargeable in bankruptcy [R. 89].

He made a Conclusion of Law that the debt is not dischargeable in bankruptcy [R. 90].

Upon petition for review before the United States District Court, which petition was filed by Petitioner herein, that Court affirmed the decision of the Referee excepting that the Court vacated the Findings of Fact [R. 105]. The order was in two parts: (a) The Referee's order denying the injunction was affirmed [R. 104]; (b) "The order, in all other respects, and the findings of fact are reversed" [R. 104].

The latter section of this order had the effect of neutralizing the findings on the charge of obtaining money by false representations and the non-dischargeability of the debt.

Then follows Petitioner's Notice of Appeal in which he appeals from the said order "Vacating and Setting aside the Referee's Findings of Fact and dismissing Bankrupt's Petition" [R. 114-115]. He could have appealed from the order in so far as it dismissed the Bankrupt's

petition for an injunction, leaving the order Vacating the Findings standing (Rule 73 United States District Court). But he did not do so.

He appealed from the order in its entirety.

The United States Circuit Court of Appeals, in its decision, reinstated the Findings of Fact, thereby sustaining Petitioner's appeal in that regard [R. 134-135].

Can Petitioner now claim that the Referee erred in refusing to exercise jurisdiction in declaring the dischargeability of the debt—when by his own voluntary act he, the Petitioner, has established and successfully litigated Findings of Fact which declare the debt non-dischargeable and which declare it to be one for obtaining money by false representations? (5 C. J. S. 222; 5 C. J. S. 227, Sec. 1514.)

“As a general rule any voluntary act or course of conduct on the part of a party, with knowledge of the facts, by which he expressly or impliedly recognizes the validity of a judgment, order, or decree against him operates as a waiver of his right to appeal therefrom or to bring error to reverse it, as where he obtains affirmative relief under the judgment. The general rule applies, however, only where the acts relied upon as a waiver are such as clearly show a recognition of the judgment, order, or decree as valid.” (4 C. J. S. 403.)

“It is a well settled general rule, declared in some states by express statutory provision, that a party is not aggrieved by a judgment, order, decree, or ruling regularly rendered or made, on agreement or otherwise, with his express or implied consent, and therefore he cannot appeal or sue out a writ of error to review the same, even though there has been an

attempt to reserve the right to appeal, and even though the consent order was not authorized by the pleadings. Under this general rule, a party generally is estopped or waives right to appeal or bring error where a judgment, order, or decree was entered on his motion, offer, or admission or at his request." (4 C. J. S. 404-405.)

Petitioner is also bound by the same decision of the United States Circuit Court of Appeals on the ground of Election of Remedies. (28 C. J. S. 1077-1080.)

Arguing Petitioner's first point we now come to his authorities.

He cites and quotes *Local Loan Co. v. Hunt*, 292 U. S. 234, at length.

He fails by this case to show that the District Court should have exercised jurisdiction to decree the dischargeability of the debt in our *Walters* case.

The *Local Loan Co. v. Hunt* case opens as follows:

"On September 17, 1930, respondent borrowed from petitioner the sum of \$300, and as security for its payment executed an assignment of a portion of his wages thereafter to be earned. On March 3, 1931, respondent filed a voluntary petition in bankruptcy in a federal district court in Illinois, including in his schedule of liabilities the foregoing loan, which constituted a provable claim against the estate. Respondent was adjudicated a bankrupt; and, on October 10, 1932, an order was entered discharging him from all provable debts and claims. On October 18, 1932, petitioner brought an action in the municipal court of Chicago against respondent's employer to enforce the assignment in respect of wages

earned after the adjudication. Thereupon, respondent commenced this proceeding in the court which had adjudicated his bankruptcy and ordered his discharge, praying that petitioner be enjoined from further prosecuting said action or attempting to enforce its claim therein made against respondent under the wage assignment. The bankruptcy court, upon consideration, entered a decree in accordance with the prayer; and this decree on appeal was affirmed by the court below (67 F. (2d) 998), following its decision in *Re Skorcz* (C. C. A. 7th) 67 F. (2d) 187.

“Challenging this decree, petitioner contends: That the bankruptcy court was without jurisdiction to entertain a proceeding to enjoin the prosecution of the action in the municipal court; that, assuming such jurisdiction, the rule is that an assignment of future wages constitutes an enforceable lien; but that, in any event, the highest court of the State of Illinois has so decided, and by that decision this court is bound.” (93 A. L. R. 197-198.)

The foregoing case is neither applicable to our case from the standpoint of the issues involved nor in its determination.

The distinctions between the two cases are extremely well defined. In particular they are as follows:

(1) There was no judgment against Hunt in favor of Local Loan Co. when Hunt filed in bankruptcy on March 3, 1931. The Municipal Court case was filed after Hunt was adjudicated a bankrupt.

In the *Walters* case, the Wilson judgment was seven years old when Walters filed in bankruptcy in 1939 and had been once renewed by default.

(2) The suit in the Chicago Municipal Court brought by the Local Loan Co. was against Hunt's employer, not Hunt. Hunt was not a party nor did he intervene.

The *Walters* original suit in the California Superior Court was between *Wilson and Walters* [R. 28] and the later proceeding that went to the State Supreme Court of California on appeal was between *Wilson and Walters*. (19 Cal. (2d) 111.)

(3) The decision relied upon by Local Loan Co. in its appeal from the order for injunction issued by the Federal Court was a Supreme Court decision of the State of Illinois in the case of *Mallin v. Wenham*, 209 Ill. 252. None of the parties of the *Local Loan Co.* case were parties to that suit. The *Mallin* case was mere precedent at best. It was in no sense *res adjudicata*. It did not decide a single issue between the parties in the *Local Loan Co.* case. The Federal Court was not bound by that decision more than any Federal Court is bound by precedent in a state court.

In the *Walters* case the very issue between the same parties, and the main issue involved in this appeal was adjudicated first by stipulation of those parties in the Superior Court of Los Angeles County [R. 44] and in the later proceeding in the same court which was finally determined in favor of *Wilson* in the State Supreme Court. (*Wilson v. Walters, supra.*)

(4) In the *Local Loan Co.* case the action commenced in the Chicago Municipal Court, was enjoined before it reached judgment, and no final decision of the issues therein was ever rendered outside of the Federal Court.

In the *Walters* case, both cases in the California courts had become final, one by stipulation and the other by default, before Walters resorted to the Federal Court for relief against Wilson's claim after his adjudication in bankruptcy. And, prior to his petition for injunction the California State Supreme Court decision in the *Wilson v. Walters Case (Supra)* had likewise become final on the question here involved.

(5) In the *Local Loan Co.* case, the bankrupt Hunt first appeared in the Federal Court in his action to enjoin the foreclosure of the "lien" of the Local Loan Co. upon his future wages.

In the *Walters* case we find two very sharp and significant contrasts on this point from the *Local Loan Co.* case, namely:

(a) When Walters filed in bankruptcy, he had twice agreed to judgment on the Wilson claim. The first time by stipulation and the second time when the judgment was renewed.

(b) Before *Walters* started his proceeding in the Federal Court to enjoin the enforcement of the Wilson judgment and for a decree declaring the judgment dischargeable, the third state court order had become final by the decision of the California State Supreme Court:

Thus Walters had three times voluntarily submitted the issues of Mrs. Wilson's claim to the state courts where they had been decided against him, before he appealed to the Federal Court for injunction or declaratory relief without once resorting to the Federal Courts for relief.

Walters himself raised the issue of his bankruptcy and the question of false representations involved therein in

the proceeding which was finally determined by the California State Supreme Court.

Walters could have started his proceeding in the Federal Court while the State proceeding was pending, to enjoin it, but he did not do so. He chose to submit the issue to the State court for its final determination.

In the *Local Loan Co.* case we find this significant language:

"So far as appears, the municipal court was competent to deal with the case. It is true that respondent was not a party to that litigation; but undoubtedly it was open to him to intervene and submit to that court the question as to the effect upon the subject matter of the action of the bankruptcy decrees. And it may be conceded that the municipal court was authorized in the law action to afford relief the equivalent of that which respondent now seeks in equity. Nevertheless, other considerations aside, it is clear that the legal remedy thus afforded would be inadequate to meet the requirements of justice. As will be shown in a moment, the sole question at issue is one which the highest court of the State of Illinois had already resolved against respondent's contention. The alternative of invoking the equitable jurisdiction of the bankruptcy court was for respondent to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined. The amount in suit is small, and, as pointed out by Judge Parker in *Seaboard Small Loan Corp. v. Ottinger*, *supra* (50 F. (2d) at p. 859, 77 A. L.

R. 956, 18 Am. Bankr. Rep. (N. S.) 500) such a remedy is entirely inadequate because of the wholly disproportionate trouble, embarrassment, expense, and possible loss of employment which it involves."

Walters chose the "obviously long and expensive course of litigation." (*Local Loan Co. v. Hunt.*)

(6) In the *Local Loan Co.* case the amount involved was "small, as pointed out by Judge Parker," the amount involved being only \$300.00.

In the *Walters* case, the amount involved at the time Walters filed his proceeding in the Federal Court was \$8,858.75 with interest at 7% from August 20, 1937 [R. 50].

(7) In the *Local Loan Co.* case the court used this language:

"What has now been said establishes the authority of the bankruptcy court to entertain the present proceeding, determine the effect of the adjudication and order, and enjoin petitioner from its threatened interference therewith. It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist." (93 A. L. R. 199.)

This surely is decisive on the point that the Federal Court *was not bound* to exercise its jurisdiction. It "would not and should not" have done so but for the "unusual" circumstances.

(8) *Unusual Circumstances.*

In the *Local Loan Co.* case there were present "unusual circumstances" which, according to the Court's opinion, justified its intervention and without which it "should not and would not" have intervened.

The Court does not state directly what these "unusual circumstances" were. But the events and proceedings recited in the opinion while discussing that phase of the case show clearly what the Court had in mind.

In our distinction between the *Local Loan Co.* case and the *Walters* case we have pointed out the wide difference between the facts of the two cases. Our analysis, we submit, shows the unusual nature of the *Local Loan Co.* case and, wherein the *Walters* case was not unusual as compared to the *Local Loan Co.* case.

In substance, the Court in the *Local Loan Co.* case says:

While Hunt was not a party to the Municipal Court case, he could have intervened. Had he done so, such proceeding would have been inadequate for several reasons:

- (1) It would have involved a long and expensive proceeding through State courts.
- (2) There was a State Supreme Court decision in another case already determining the point in issue adversely to him.

- (3) The amount involved was too small, "and as pointed out by Judge Parker in *Seaboard Small Loan Corp v. Ottinger* (50 F. (2d) 859), such a remedy is entirely inadequate because of the wholly disproportionate trouble, embarrassment, expense and possible loss of employment which it involves." (*Local Loan Co. v. Hunt, supra.*)

The case was unusual in the three respects just noted. It was, as mentioned under the second notation just above, unusual because of the unsettled state of the law on the subject involved.

The Illinois decision in *Mallin v. Wenham*, 209 Ill. 252, alluded to by the court, and upon which the Municipal Court based its erroneous decision, together with a few other cases on the same question, was against "the greater weight of authority" according to the court.

The question was one of substantive law, not of pleading.

"When a person assigns future wages, he, in effect, pledges his future earning power. The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much if not more than it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern." (93 A. L. R. 201-202.)

The Petitioner in our *Walters* case admits that the *Mallin v. Wenham* case was erroneous. (Petitioner's Brief p. 55.)

But in the California Supreme Court case of *Wilson v. Walters*, we have a positive decision on a fundamental question of Pleading, which, so far as this proceeding is concerned settles this important issue:

Did the original complaint, upon which the basic judgment was taken by stipulation, state a cause of action for obtaining money by false representations as that charge is defined by California law?

The Municipal Court decision in the *Local Loan Co.* case, controlled as it was by the *Mallin v. Wenham* case, created an unusual circumstance for the Supreme Court's consideration in the *Local Loan Co.* case, because of the unsettled state of the law.

There is nothing unsettled in the law as determined by the California Supreme Court in the *Walters* case, excepting that Petitioner objects to it.

Wherein was the *Walters* case "unusual" measured by the "yardstick" of the *Local Loan Co.* case?

If it was unusual at all, its unusual nature consists of the following:

(a) The fact that after stipulating to a judgment based on a complaint for obtaining money by fraudulent representations, in August 1932 [R. 47], and after the entry of a judgment (renewing the first judgment) by default in August, 1937, after almost seven years, he filed in bankruptcy on June 9, 1939;

(b) That after Mrs. Wilson levied garnishment on his salary as Municipal Court Judge in May, 1940, he did not attempt to enjoin her through any appeal to the Bankruptcy Court but, rather, resisted her proceeding in the State Court and continued to

so resist it in the State Courts until after December 2, 1941, when the matter was finally adjudicated by the Supreme Court of California. (*Wilson v. Walters*, 19 Cal. (2d) 111, *supra*.)

(c) That after these three state decisions against him, for the first time he started a direct attack in the Federal Courts against this judgment. (He had listed it in his voluntary Petition in Bankruptcy.)

(d) That this judgment now amounts to in excess of \$12,000.00 including interest from August 27, 1937 [R. 50]. That no payments have been made on the principal of the judgment at all and almost nothing to affect the mounting interest. [The record does not show any payments at all—R. 26.]

Where is there any indication of harrassment in the record excepting the bankrupt's statement in his petition [R. 3-8] which the respondent *Mrs. Wilson* denied [R. 18-27]?

He states that he is a Municipal Court Judge [R. 7].

That his salary is necessary for the support of his family [R. 7].

That *Mrs. Wilson's* attempt to collect her judgment is embarrassing to him; that it disturbs his work and that the attendant publicity damages him irreparably [R. 8].

We ask, why did he not immediately adopt the short and direct attack upon the *Wilson* judgment by resort to the Federal Courts and not pursue and await the action

of the State Courts thereon, if he was being harassed by Mrs. Wilson or if he was suffering embarrassment? Such a procedure would have been easier on Mrs. Wilson and certainly less expensive to her, not to mention his own interests.

He chose his own course, and the most unusual aspect of his case is the novel artifice by which he attempts to side step the results of his own unusual conduct.

We submit that the *Local Loan Co.* case does not supply any law or reason for the intervention of the United States Supreme Court on the basis of "unusual circumstances" in this case.

Nor do the cases of:

Holmes v. Rowe, supra (9 Cir.);

Davison, Paxon Co. v. Caldwell, supra;

In re Skorcz, supra;

Sims v. Jamison, supra (9 Cir.) (Cited in *Local Loan Co. v. Hunt*);

Seaboard Small Loan v. Ottinger, supra (Cited in *Local Loan Co. v. Hunt*);

In re Swofford Bros. Dry Goods Co., 180 Fed. 549 (Cited in *Local Loan Co. v. Hunt*);

Pell v. McCabe, 256 Fed. 512 (cited in *Local Loan Co. v. Hunt*), cited by the Petitioner on page 55 of his brief furnish anything different or more nearly in point than the *Local Loan Co.* case.

EFFECT OF CALIFORNIA SUPREME COURT DECISION IN
THE WILSON V. WALTERS CASE UPON THE BANK-
RUPTCY COURT.

This question was raised on page 56 of Petitioner's Brief.

Here again Petitioner appears to think that we question the Bankruptcy Court's jurisdiction to determine the dischargeability of the debt in this case.

The cases cited by Petitioner under this head are far afield and not applicable to the present issues or facts.

He mentions the *Davison-Paxon Co. v. Caldwell* case (113 Fed. (2d) 189) and quotes from it. (Pages 62, 63 and 64 of his Brief.)

In his quotations from this case, Walters very carefully avoids *the one deciding* factor that prompted the Federal Court in its reversal of the Georgia State Court.

The Federal Court held that notwithstanding the sufficiency of the complaint to state a cause of action on the ground of fraud *which is dischargeable* (unless by a public official), *it lacked one very essential element* to state a cause of action on the ground of false representations, namely, *the allegation that there were any false representations made.*

And, because the complaint lacked that very essential allegation, the Federal Court reversed the Georgia State Court.

Moreover, in the *Davison-Paxon* case we again find present some distinct contrasts with the *Walters* case.

The bankrupt, when the creditor attempted to levy execution, immediately petitioned the Federal Court for an

injunction. He did not at any time agree to the judgment in the Georgia State Court. It was not by his stipulation nor upon his default.

But there is another distinguishing feature about the *Davison-Paxon* case. It does not rule upon the question of jurisdiction at all.

It does not hold that the Federal Court is *bound* to *exercise its jurisdiction* to overrule the Georgia State Court. So far as the *Davison-Paxon* case shows, the action of the Federal Court was purely discretionary.

But, there was present in that case an unusual circumstance—namely, the *failure of the basic complaint to allege a cause of action at all*, upon the ground of *false representation*.

As we shall later show, the complaint in the *Walters* case was “complete” as stating a cause of action for false representations sufficient to satisfy the requirements of the Bankruptcy Act.

Walters, in his brief, cites the case of *In re Skorcz*, 67 Fed. (2d) 187, which only holds that the Bankruptcy Court has *power* to enjoin when future wages of the bankrupt are involved under a lien.

Petitioner cites *Hobbs v. Franklin Jewelry Co. Inc.*, 131 Fed. (2d) 432, several times. Had he followed this case through he would have found that it clearly supports Respondent’s theory and is not in the category of cases which would justify the exercise of jurisdiction by the District Court herein.

Lowce v. California Federation of Labor, 189 Fed. 714, cited by Petitioner on page 59 of his Brief. A portion of this case is, we submit, good law but does not assist in

the present controversy. The Petitioner overlooks "excepting so far as affected by local statutes," in this case.

John Deere Plow Co. v. McDavid, 137 Fed. 802. This case involved a "rule of preference and equity." But the Petitioner is asking the Federal Courts to reverse a State Supreme Court's decision on a question of pleading.

Reynolds v. N. Y. Trust Co., 188 Fed. 611. Here the Court was called upon to distinguish between firm and individual liability upon waiver of tort.

"The bankruptcy court recognizes a distinction between firm and individual debts" (p. 619).

"The bankruptcy statute gives priority of rights in assets to creditors according to whether the debts are partnership or individual" (p. 618).

This Court held that the Bankruptcy Court in the exercise of its jurisdiction has the right to determine whether an obligation on a contract arises upon a conversion of goods, available to the owner when he waives his remedy in tort (based upon the common law) and is not *controlled* by the decision of State Courts in that regard.

The principal question was—did the creditor have the right to waive the tort and sue in contract, regardless of whether the debtor had sold the goods or "kept, consumed or concealed them?"

Clark v. Rogers, 183 Fed. 518. We cannot find, in this case, anything to support Petitioner. The principal point instead, in this case, was, "Do a defaulting trustee and his co-trustee (*cestui que trust*) stand in the relation of debtor and creditor?" (P. 525.) The question concerned

the right of such a debt to preference under the bankruptcy laws and the distinction between the trustee's individual and his trust capacity.

It was held that Bankruptcy Courts had the right to construe "upon a contract express or implied" to include *quasi* contracts.

We fail to find anything in this case to hold that Federal Courts may not recognize the decision of a State Court passing upon a question of pleading in a State Court.

Harrison v. Foley, 206 Fed. 57.

This case discussed the "law of the case"—which is plainly not involved in the *Walters* case since "Law of the case" only applies between successive actions in the same Court.

But *Walters* stopped too soon in his reading from this case. Here Mrs. Foley sued Harrison, administrator for Melby, deceased, in a State Court of Missouri, to recover contents of a safety deposit box, claiming they were given her by Melby anticipating death. Verdict was in her favor. It was vacated, and on appeal, the order was affirmed and a new trial ordered. Before the new trial, she dismissed without prejudice and sued in the Federal Court where she was awarded the verdict. Harrison prosecuted writ of error.

The Federal Court held that since the verdict in the State of Missouri had been vacated by the Supreme Court,

"There was no judgment in the State Courts which could be pleaded as *res adjudicata* nor was the de-

cision of the State Supreme Court a construction of a local statute or the establishment of a local rule of property" (p. 59).

In re Plotke, 104 Fed. 964.

Not in point. The validity of the assignment was "not questioned under the state statutes."

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.

This case involved action by a widow before the State Industrial Commission for relief on account of death of her husband as an employee of Knickerbocker Ice Co. where he was a bargeman. It was held that the Industrial Commission had no jurisdiction even though compensation insurance was involved because the employment of the deceased was a maritime matter and, *under the Constitution* of the United States, Federal Courts had exclusive jurisdiction of all matters of a maritime nature.

(Justice Holmes dissented.)

We shall show hereafter that the bankruptcy statutes are not so limited.

In re Pacific Alloy Steel Co., 299 Fed. 952.

In this case the Pacific Alloy Steel Co. went into bankruptcy while owing a power bill to Great Western Power Co. of California. The latter company attempted to divest the Bankruptcy Court of jurisdiction on the ground that the alleged bankrupt had forfeited its State Charter and had no corporate rights to file in bankruptcy.

There is no similarity between the two cases nor in the issues decided.

San Francisco Shopping News Co. v. City of San Francisco, 69 Fed. (2d) 879.

This case involved the construction of a city ordinance prohibiting the local distribution of hand bills, etc., from house to house. The question was—does the ordinance violate the 14th Amendment to the Constitution.

This case, like the others cited by appellant, is far afield as to the facts and issues.

But the Court determines that “the (Federal) Court will accept as correct the interpretation which has been placed upon such (State) statute by the State Court.”

Crescent Live Stock v. Butchers Union, 120 U. S. 141.

Here there was a series of cases involving different parties, and the U. S. Supreme Court in the final case was discussing the value and effect of precedent between State and Federal Courts, nothing more.

In the *Walters* case, we have a vastly different situation where *res adjudicata* is the issue, between the *same parties* and involving a judgment by stipulation and consent.

*Cases and Argument in Opposition to Petitioner's
Point 1-C.*

Respondent now presents her authorities to show that Federal Courts may and do regard decisions of State Supreme Courts on the questions involved in the *Walters* proceeding as *res adjudicata* and binding.

Federal Courts likewise recognize and regard as binding, decisions of State Supreme Courts which adjudicate the sufficiency of pleadings in State Courts.

In the *Walters* case, it was decided by the State Supreme Court that the basic complaint was sufficient to

state a cause of action; that the plaintiff did not waive the tort; that fraud and obtaining money by false representations was sufficiently pleaded.

And judgment was by stipulation "in accordance with the allegations of the complaint."

With the foregoing in mind we submit the following:

"The rule as to the conclusiveness of an adjudication where the same matter again comes up between the same parties is too familiar to require much re-statement. It adjudicates questions of both law and fact upon which their rights depend, and those which might have been determined as well as those which were."

Handlaw v. Walker, 200 Fed. 566-(568).

Where a suit in a State Court was based on the construction of a contract by which claimant claimed the right to an undivided half of certain property purchased for a city waterworks system, and judgment was *res adjudicata* of an issue as to whether complainant's right under the contract was to an undivided one-half ($\frac{1}{2}$) of the property itself or only to an interest in the profits derived therefrom (involved in a suit in the Federal Court).

Swift v. McFarland, 215 Fed. 452.

Defendants in a suit in the Federal Court, are concluded by a decision in complainant's prior suit in a State Court to which they were all parties, as to the question there decided.

Belts v. Great Western Lead Mfg. Co., 251 Fed. 696.

"The adjudication in a State Court of a question directly in issue between the parties is conclusive between the same parties suing in a Federal Court, as to that issue."

Grizzi v. Delaware & H. Co., 266 Fed. 513.

There can be no exception to this rule under judgments after trial upon the merits.

The case of *Detroit Trust Co. v. Schwartz*, 16 Fed. (2d) 943, held that a trustee in bankruptcy is bound by the decree of a State Court adjudging that the bankrupt did not own the property claimed (in U. S. District Court proceeding) to have been preferentially and fraudulently transferred, *in the absence of a showing that the decree was procured by fraud.*

"A judgment is *res adjudicata* as to whether or not a liability is for 'willful and malicious injury to person or property' and a State court's ruling on the nature of the liability will be adopted."

Remington on Bankruptcy, Sec. 3553, Vol. 7 p. 821.

"Conversion of funds is established by the decision of a State Court sufficient to bar a discharge in bankruptcy where defendant was originally sued on contract by the creditor and when, after defendant's departure from the state, the cause of action was charged to tort by general allegations admittedly to avoid the discharge in bankruptcy."

Young v. City Bank, 223 S. W. (Tex.) 340.

In *In re Ruchkonski*, 39 Fed. (2d) 969, the question involved a chattel mortgage allegedly given to defraud creditors (which would seem to be a matter directly for the Bankruptcy Court to decide). The State Court of Minnesota affirmed that decision. (177 Minn. 84.) The case came to the Federal Court which held:

"The bankrupt now contends that the judgment in the State Court does not justify the finding or recommendation of the Special Master because the same rule of evidence does not apply in this court on the application for discharge and the objections thereto, as prevailed in the State Court; that the Special Master was therefor required to retry the question as to whether the Chattel Mortgage was in fact given to defraud creditors * * *

"The question as to whether Chattel Mortgages are fraudulent or otherwise is determined by the laws of the state where they are made. (Numerous citations.)

"The general rule is, as stated by the Special Master in his findings, that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment on the first suit remains unmodified." (Citations.)

Again, we have this from the case of *U. S. v. Sakharav Ganesh Pandet*, 15 Fed. (2d) 285. The State Court having jurisdiction, the judgment of that Court upon *federal*

questions is *res adjudicata*. (*Mitchell v. First National Bank*, 180 U. S. 471.) The answer raises a right and immunity under the "Commerce Clause" of the Constitution. The identical issue was before the State Court by Petitioner's invitation on petition for review, and that question was considered by the State Court and decided against the Petitioner, and the decision may not be reviewed or revised by this Court. (*Boston v. McGovern*, 292 Fed. 705.) The transportation was of a local nature—Columbia to Bellingham. The issue was decided and the parties are bound by the decree. * * *

"The foundation of the doctrine of *res adjudicata* or estoppel by judgment, is that both parties have had their day in court. The general principle was clearly expressed by Mr. Justice Harlow speaking for this court in *So. Pac. R. Co. v. U. S.*, 168 U. S. 148. 'That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies.'"

U. S. v. Sakharaw Ganesh Pandet, 15 Fed. (2d).

"C. C. A. Ark. Neither the District Court nor the Circuit Court of Appeals can by way of review or otherwise allow relitigation of issues that were tried and determined in State court."

Missouri Pac. Transp. Co. v. Priest, 117 F. (2d)
32.

"C. C. A. Utah. Where State Supreme Court reversed trial court and held that a debtor had forfeited his rights in property by failing to make payments due, and that creditor was entitled to possession of

property, and entered its judgment to such effect and issued its mandate directing trial court to enter such a judgment, decision of State Supreme Court was a conclusive determination of the controversy."

Bastian v. Erickson, 114 F. (2d) 338.

"A State court's judgment may not be reviewed by bill in equity in a Federal court."

Chirillo v. Lehman, 38 F. Supp. 65, affirmed 61 S. Ct. 741, 312 U. S. 662, 85 L. Ed.

"D. C. N. Y. In action in Federal District Court for Southern District of New York to recover a bank deposit, 'full faith and credit' was required to be given to New York attachment proceedings in which warrants of attachment had been levied against the deposit."

28 U. S. C. A., Sec. 687;

Steingut v. National City Bank of New York, 38 F. Supp. 451.

"D. C. Wis. Where the material fact issues raised by the pleadings in action on life policy before the Federal District Court were tried to a jury in an action on a similar life policy in a Wisconsin circuit court which determined the issues in favor of plaintiff and against defendant, and the Wisconsin Supreme Court affirmed the circuit court's judgment, that judgment was *res adjudicata* on the material issues raised by the pleadings in the case before the Federal District Court."

Tully v. Prudential Ins. Co. of America, 33 F. Supp. 680.

The other cases cited by Petitioner under this same head are equally inapplicable.

When is a litigant entitled to equitable relief from a judgment?

"To entitle a litigant to equitable relief from a judgment which would otherwise be *res adjudicata*, it must appear that an injustice has been done and that the judgment assailed is inequitable and that it is against equity and good conscience to enforce it. *But a judgment that is in no way tainted by fraud or misrepresentation in its procurement is not unjust and inequitable.*"

Mo. Pac. Transport Co. v. Priest, 117 Fed. (2d) 32.

There is no showing nor charge in Petitioner's case that there was any fraud exercised or attempted in the procuring of the *judgment* by Respondent.

IS THE CALIFORNIA SUPREME COURT DECISION IN THE WILSON V. WALTERS CASE DICTUM AS TO THE EFFECT OF THE DISCHARGE IN BANKRUPTCY?

Petitioner argues that it is (Petitioner's Br. p. 70).

He quotes the Appellate Court's decision from which Respondent appealed on a petition for hearing before the Supreme Court, which stated: "This is the sole question necessary for us to determine: Is a Judge of the Municipal Court of the City of Los Angeles a Constitutional Officer of the State of California?" (*Wilson v. Walters*, 112 Pac. (2d) 964.)

He does not quote from the recital in *Wilson v. Walters*, 19 Cal. (2d) 111, in the Supreme Court, which contains the following:

“On May 31, 1940, defendant filed a notice of motion for an order releasing the money so held by the Superior Court, which motion was based upon three grounds, namely, that defendant’s salary as a Municipal Court Judge was not subject to garnishment; that defendant had been discharged in bankruptcy; and that the salary was exempt from execution under section 690.11 of the Code of Civil Procedure because it was earned within the period of thirty days next preceding the filing of the abstract of judgment with the county auditor. The court made its order granting the motion, stating therein: ‘. . . defendant’s discharge in bankruptcy does not release the claim of plaintiff’s judgment herein. The motion of defendant to release the balance of money under garnishment is granted upon the sole ground that defendant is . . . a judge of the Municipal Court’”

This definitely shows the Supreme Court to have full authority to pass upon the *three grounds* upon which the defendant Walters sought to defeat Mrs. Wilson’s attempt to garnishee his salary, one of which was his alleged Discharge in Bankruptcy. Our reasoning follows:

Respondent levied garnishment on Petitioner’s salary as Municipal Court Judge by a proceeding in the Superior Court under Section 710 of the California Code of Civil Procedure (R. 64-65).

This garnishment was levied under Respondent’s judgment secured on August 17, 1932, and renewed August 20, 1937.

Petitioner opposed Respondent's proceeding with a motion to release his salary so levied upon, and based his motion on three grounds:

(1) That his salary as a Municipal Court Judge was not subject to garnishment.

(2) That he had been discharged in bankruptcy; and

(3) That his salary was exempt from execution because it was earned within thirty days from the filing of the Abstract of Judgment [R. 65].

The Superior Court ruled that Respondent's said judgment had not been discharged in bankruptcy and that his salary could not be levied upon because he was a constitutional officer of the State of California (R. 65).

Petitioner now argues:

"The trial court undertook to state as a matter of pure *dictum* that the discharge in bankruptcy was not a release. The order being in favor of the bankrupt, it was wholly unnecessary to rule upon the bankruptcy issue. Bankrupt was not aggrieved and therefore did not appeal from the dictum." (Petitioner's Br. 70.)

The trial court's decision on the bankruptcy matter was not *dictum*.

If it is to be construed as *dictum*, then for that specific reason, in addition to others, the Supreme Court's decision is *not dictum*.

If the Superior Court's decision on the bankruptcy issue was, as Respondent contends, undecided when the matter came to the State Supreme Court, then for that very reason the Supreme Court had full authority to determine it.

By the nature of the proceeding it had to go back to the Superior Court after the Supreme Court's decision for determination of the *amount* to be covered by the garnishment.

If the matter of the discharge in bankruptcy and its effect upon the judgment were undetermined, what would prevent Petitioner from *again claiming that the debt was discharged*, when the Superior Court took up Respondent's garnishment for consideration in keeping with the State Supreme Court's decision?

It is a rule that is supported by a mass of decisions in California that the Supreme Court may determine every question and issue raised by the pleadings, particularly when the same question or issue might be raised at a future time if left undecided.

"The Supreme Court, and the District Courts of Appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. The decision of the court shall be given in writing, and in giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appeal cases shall be remitted to the court from which the appeal was taken." (C. C. P. Sec. 53.)

2 Cal. Jur. 802-803;

Weisser v. So. Pac. Ry. Co., 148 Cal. 426;

Westerfield v. New York Life Insurance Co., 157 Cal. 339;

Bradford Investment Co. v. Joost, 117 Cal. 204;

Cabe v. City of Los Angeles, 164 Cal. 705.

Respondent's garnishment proceeding was a special one which might arise repeatedly and to leave unsettled the *bankruptcy question which was raised by the judgment debtor and submitted to the Superior Court by him for decision* would pave the way for future controversy and litigation.

The hearing on the question as to the amount to be allowed Mrs. Wilson by her garnishment, after the case was remitted to the Superior Court, was in the nature of a new trial, and the Supreme Court acted wisely and properly in disposing of the issue.

The fact that the Appellate Court believed it had only one question to determine did not bind the Supreme Court to the consideration of that one question on the hearing in that court.

The record on appeal in the State courts is not a part of the record here.

The statement of the State District Court of Appeal, in its opinion, that the one question to be determined was the one that it decided, is not binding on the Supreme Court.

The contents of the Notice of Appeal and of the Briefs of the litigants in that appeal are unknown to this court. They were not unknown to the State Supreme Court of California.

The decision of the State Supreme Court of California is entitled to the presumption that the bankruptcy matter was an issue on the appeal, made so by the pleadings and briefs.

If this matter is argued orally, we respectfully request the Petitioner to produce at the argument copies of the printed transcript and briefs in the said appeal in the

California Courts, in order that this Court may determine if it so desires,

(a) Whether the discharge in bankruptcy was an issue on that appeal, and

(b) If it was, who raised such issue.

On the other hand, if the decision of the Superior Court on the question of the discharge in bankruptcy was *not dictum*, then it became final by the Petitioner's (*Walters*) failure to appeal from it and in that case it is as binding (being final) as if it were a decision of the State Supreme Court. In which case the question as to whether the decision of the State Supreme Court was or was not *dictum* would be immaterial.

In this connection we point out that the question of the discharge in bankruptcy submitted to the Superior Court as a defense by *Walters* was submitted as a ground for defeating the garnishment and called for a decision of the Superior Court on its merit. Had the Superior Court decided that the debt *was discharged* by *Walters'* bankruptcy, no garnishment nor execution could have issued out of that Court, nor prevail if issued, unless such decision were reversed on appeal.

In closing our argument in this point, we submit a definition for the Court's consideration—a definition of "*dictum*" found in 21 C. J. S., pages 309-316, which indicates that Petitioner has, in his argument, misunderstood the meaning of the word and its function. We submit that the term cannot, under this definition, be applied to the *Wilson v. Walters* decision.

In this connection we note that Petitioner questions the finality of the California Supreme Court's decision in the *Walters* case.

He says "The said case is now pending in the said Superior Court." (Pet. Br. p. 4.)

He says on page 34 of his brief that "The State Supreme Court's decision * * * is not a final judgment."

He repeats this same statement on page 68 of his brief.

A reading of the decision in the State Supreme Court case of *Wilson v. Walters* demonstrates that the decision was final on all issues excepting "to determine what, if any portion of the defendant's salary as levied upon is exempt under Section 690.11 of the Code of Civil Procedure, and thereupon enter an order directing the disbursement of such portion of the defendant and any balance remaining to plaintiff in partial satisfaction of the judgment against defendant."

Section 690.11 gives Petitioner the right to exemptions of salary where necessary for the support of his family.

II.

Petitioner urges as his second point that the Circuit Court erred by "failing to make any findings of fact upon which to base its order."

Petitioner properly considers The Findings of Fact and Conclusions of Law as made by the Referee re-instated (Pet. Br. p. 74).

What material issues are left undetermined by the Findings of Fact and Conclusions of Law?

Petitioner points to four recitals quoted from his Petition for Injunction in the Bankruptcy Court upon which he claims there should have been Findings.

It is a rule of universal application in practically all of the States, accepted by the Federal Courts, that when findings of fact are made upon all of the material issues of the case, it is unnecessary to find upon immaterial or purely incidental matters.

We submit that every material issue raised by the petition and affidavit in opposition thereto is covered by the Findings of Fact and Conclusions of Law. (See Findings of Fact and Conclusions of Law R. 81-91.)

The fact that Mrs. Wilson did not file her claim in Walters Bankruptcy proceeding before discharge is immaterial. She need not file her claim if it is not dischargeable and the Court found that it was non-dischargeable (R. 89).

The fact that Mrs. Wilson made no objection to Walters' listing of her claim in his schedule is likewise immaterial if the claim was non-dischargeable. The Court found it was non-dischargeable (R. 89).

The fact (if it be a fact) that Mrs. Wilson threatened to enforce her judgment against Walters is immaterial for the same reason, the Court having found the debt to be non-dischargeable. A finding that "such procedure would nullify the decree of this Honorable Court, etc." would be surplusage as pure conclusion of law.

The alleged facts set out in "paragraph VII (R. 7-8)" referred to on page 72 of Petitioner's Brief must be immaterial in view of the Findings of fraud, non-payment, and non-dischargeability of the debt, which are ultimate facts covering all aspects of the case.

A finding of ultimate facts necessarily includes all probation facts together with inferences, deductions, and conclusions therefrom.

64 C. J. 1251;

Nashville Interurban Ry. v. Barnum, 212 Fed. 634.

"It has been repeatedly held that if findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error. Thus it is not prejudicial error to fail to find upon a cause of action which alleges in another form the cause of action stated in preceding counts and does not add materially to the statement of facts contained in other parts of the complaint upon which findings are made. A failure to find on issues presented by a cross-complaint is immaterial where the facts alleged are not inconsistent with those alleged in the complaint and the findings made necessarily involve a consideration of the claim in the cross-complaint. So also where the matters alleged in an answer do no more than contradict some allegation of the complaint, as to which the findings are complete, it is unnecessary to make specific findings thereon." (24 Cal. Jur. 947.)

III.

Under point III, Petitioner seeks to show that the debt represented by Respondent's judgment is not a liability for obtaining money by false pretenses or false representations as defined by the Bankruptcy Act and that it is a liability *ex contractu*, and therefore discharged.

Petitioner refers to, without fully quoting, the stipulation for judgment which provides:

"The defendants waive trial, findings of fact and conclusions of law and stipulate that judgment be taken and entered against them, the said defendants, by confession in accordance with the allegations of the complaint." (R. 45.)

He complains that the stipulation does not say "all of the allegations in the complaint"; that it does not say "which of the conflicting allegations shall be preferred above the others"; that "it does not say which of the obviously conflicting theories shall be adopted or discarded"; that it does not say "which of the obviously conflicting causes of action shall be adopted . . ." (Pét. Br. 79.)

Our answer to this group of complaints is this:

Petitioner was an attorney at law at the time he signed the stipulation. (He had made an assignment of contracts for attorneys fees, as security for the debt (R. 32)). He was therefore informed or should have been informed as to the nature of the instrument which he was signing.

In the first place, we find no "conflicting" allegations nor theories nor causes of action in the complaint (R. 28-44).

California practice allows the joinder of causes of action in fraud with others in contract.

"The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied;
2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same;

3. Claims to recover specific personal property, with or without damages for the withholding thereof;
4. Claims against a trustee by virtue of a contract or by operation of law;
5. Injuries to character;
6. Injuries to person;
7. Injuries to property;
8. Claims arising out of the same transaction or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section;
9. Any and all claims for injuries arising out of a conspiracy, whether of the same or of different character, or done at the same or different times.

The causes of action so united must all belong to one only of these classes except as provided in cases of conspiracy, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person;

Provided, however, that in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband.

Provided, further, that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately." (C. C. P., Sec. 427.)

And the joinder of such counts in fraud with others in contract does not constitute waiver of either. If it were otherwise, what could be the purpose of such joinder?

Blodgett v. Trumbull, 83, Cal. App. 566;

Kane v. Mendenhall, 5 Cal. (2d) 749;

1 Cal. Jur. 345;

1 Cal. Jur. 356.

The foregoing authorities, which are uniformly held as the law of pleading in most of the states, clearly show that as long as the several counts pleaded arise out of the same transaction, they may be pleaded without requiring an election or without waiver of any of them.

We shall later discuss Petitioner's cases on waiver of tort under another head and cite the law which supports our theory herein.

A. Petitioner contends that the Judgment which is the basis of the claim here involved, "in apportioning damages between the two co-defendants is indisputably a judgment on contract."

We venture to dispute this "indisputable" contention.

Our position is simple and easily understood.

The judgment was joint, in so far as it was against both defendants, in the sum of \$5,700.00 together with interest. The only separate judgment was in the sum of \$730.00 together with interest against the other defendant, Johnston (R. 47).

There was no attempt to take split or several judgments against the two defendants so far as Walters is concerned. *There is no individual or separate judgment as to him in the record.*

He was, of course, the only defendant involved in the appeals and in the Bankruptcy Courts; in those cases, therefore, Walters is the only defendant involved. But his liability is always joint with his co-defendant and the payment of the joint judgment by him would release his co-defendant.

Here the judgment against both defendants jointly *was* for a definite sum, and the separate judgment against Johnston was for an additional sum. The additional sum was not awarded against Walters.

The reason for the rule on *segregation* of damages between joint *tort feasons* is stated in the California case of *Phipps v. Superior Court*, 32 Cal. App. (2d) 377-378:

"We agree with that part of the decision in *Bradford v. Brock*, 140 Cal. App. 47, 50, 51 (34 Pac. (2d) 1048), reading as follows: 'The jury returned a verdict as follows: "We the jury in the above entitled action, find for the plaintiffs and assess the damages at \$2,500.00 against Paul M. Brock, and \$2,500.00 against Schwabacher-Frey Stationery Company." Judgment thereon was entered for plaintiffs for \$2,500 as against Brock and \$2,500 as against the stationery company, being a several judgment on which plaintiffs could legally collect a total of \$5,000. The court should have construed the verdict as being for a total sum of \$2,500 against both defendants and, if otherwise satisfied with the correctness, should have entered judgment to that effect . . . The reason for the rule is obvious. If the detriment to plaintiffs caused by the operator of the car is found

by the jury to be \$2,500, they should not be permitted to collect that sum from him and then go to the owner or employer whose liability arises out of his relationship to the car or its operator, and not out of an independent act, and collect a further like sum, thereby obtaining double the amount to which plaintiffs are entitled under the jury's decision.'"

Moreover, this judgment is by stipulation, which is in itself in the nature of a contract which we submit might, if it chose to do so, segregate the damages between the *tort feasons* without losing its character as a tort judgment.

Petitioner in his Brief points to the memorandum opinion of the United States District Judge on the question of apportionment of damages which Petitioner quotes in Pages 81-82 of his Brief.

He argues that no one has questioned the soundness of that opinion.

The Court that delivered the opinion (Hon. Leon R. Yankwich, R. 101-103), questioned it for he decided against it on May 3, 1943 (R. 105).

But there was no apportionment of damages so far as the joint judgment was concerned. That judgment was for the same amount against both defendants.

B and C.

Under these two heads, pages 83 and 88 of his Brief, Petitioner attempts to show that the complaint upon which the judgment was based was on contract rather than tort and that, by the form of the complaint, Respondent waived the alleged fraud and sued in contract.

We shall argue these two points together.

On Waiver or Tort.

Under California law a count in fraud may be joined with any number of counts in contract without waiver or tort thereby resulting (C. C. P. 427, *supra*).

Under the facts pleaded in this case there was no waiver of tort nor election of the remedy of suit on the contract by Mrs. Wilson.

8 C. J. S., 1521;

Gehlen v. Patterson (*supra*);

Standard Sewing Machine Co. v. Mitchell, 132 App. Div. 539;

Rothchild v. Stein, 16 A. B. R., N. S. 476;

In re Menzin, 38 A. B. R. 435.

In the Petitioner's argument he cites certain cases in support of his theory on waiver of tort.

Hill v. Superior Court, 16 Cal. (2d) 527.

Here an attachment was issued on the appellant's affidavit. *An attachment cannot issue on a claim ex delicto.*

Stanford Hotel Co. v. M. Schweind Co., 180 Cal. 438;

L. A. Drug Co. v. Superior Court, 8 Cal. (2d) 71;

McCall v. Superior Court, 1 Cal. (2d) 527;

California Treasure Box Co. v. Superior Court, 2 Cal. App. (2d) 202.

All of these last five cases were attachment cases.

It is the law in California that an attachment may issue only upon an action upon a contract express or implied for the direct payment of money (C. C. P., Sec. 537).

Before an attachment can issue an affidavit must be signed by the person taking out the attachment stating that the action is upon contract express or implied (C. C. P., Sec. 538). The courts have held in the aforementioned and in numerous other cases, that the obtaining of an attachment in a case which involves an election of remedies between tort and contract, is an evidence of election of remedies in favor of contract and against tort. The text of the foregoing cases cited by defendant bear upon this point, and the text of the opinions upon the facts involved do not otherwise decide anything that can clarify or assist in the present proceeding.

In other cases cited by Petitioner under this head *rescission* was the form of relief sought. The following were either cited or quoted in this connection by Petitioner.

Philpott v. Superior Court, 1 Cal. (2d) 512;

McCall v. Superior Court (*supra*);

California Treasure Box Co. v. Superior Court (*supra*).

In other cases still different conditions existed, none of which are present in the *Walters* case. For instance,

Stack v. Wellman, 96 Cal. 400.

In this case there was no fraud whatsoever alleged. The complaint was in two counts, one definitely on contract and the other on conversion. This case turned on the rule then in force (before the adoption of Section 427 of the C. C. P. permitting joinder of actions in tort and contract), that

"These two causes of action cannot be joined."
(p. 401.)

Chapman v. State, 104 Cal. 690, involved a suit against the State for damages allegedly for breach of contract and negligence. When this suit was brought in 1891, there could be no suit against the State for failure in its governmental duties and on appeal the higher court held that the complaint is substantially an action for damages on the contract. No fraud or false representations were involved. The case was filed before 1907 and there could be no joinder of actions for tort and contract at that time.

Beatty v. Pac. States Sav. & Loan Co., 4 Cal. App. (2d) 695.

This case is far afield from the issues.

It merely decided that, while inconsistent facts may be pleaded in separate counts, facts that are absolutely contradictory may not be so pleaded. Nothing is accomplished by this citation.

The Wilson Case Distinguished.

There is a broad distinction between the *Wilson-Walters* case and the foregoing cases cited by Petitioner.

Mrs. Wilson did not attach.

She did not rescind.

She did not plead conversion.

She brought her action after the amendment of Sec. 427 C. C. P. permitting joinder of actions for tort and on contract.

And, in the original action this Petitioner Walters did not plead waiver of tort nor fraud as an affirmative defense. He is now estopped to set it up. He waived that defense.

Price v. De Yarmette, 27 S. W. (2d) 616;

Sleeper v. Baker, 22 N. D. 386, 134 N. W. 716.

Cases in Point on Waiver of Tort.

The cases supporting Respondent's position are legion and very much to the point.

Mrs. Wilson did not waive the tort.

She does not waive the tort by the title of her "Complaint for damages and for breach of contract," nor by the nature of the prayer of her complaint.

Luckey v. Superior Court, 209 Cal. 360;

Samuels v. Singer, 1 Cal. App. (2d) 545;

Von Schrader v. Millin, 96 Cal. App. 192.

There is the case of *Donahue v. Conley* (85 Cal. App. 15) in which plaintiff sued upon a note *without alleging fraud at all*. After defendant was adjudicated a bankrupt plaintiff secured leave to amend setting up the fraud. It appeared that defendant embezzled money belonging to plaintiff and plaintiff took his note therefor, upon which a part had been paid. Then plaintiff took a new note for the unpaid amount and the suit was upon that note. The Appellate Court held that the claim was not discharged. Interest was claimed and allowed at $4\frac{1}{2}\%$ per annum from April 29, 1918, which is not the usual 7% legal rate and must therefore have been the rate provided in the note. The lower court refused to consider fraud on the theory that the suit was on the note. The reversal pointed out the lower court's error in this regard.

The foregoing case strongly supports Respondent's position in the present case, for surely if there was no waiver in the *Donahue* case there could scarcely be in our present case where fraud was pleaded in the original case.

There is also the case of *Crespi v. Griffin* (132 Cal. App. 526), where the plaintiff was also suing on a prom-

issory note. Again there was no allegation of fraud in the plaintiff's complaint at all. Discharge in bankruptcy was pleaded by defendant and the trial court permitted plaintiff to show the fraudulent nature of the transaction for which the note was given and to show that "fraud was included in and incidental to, that obligation." The Appellate Court affirmed the lower court's decision for plaintiff.

The fact that plaintiff claimed only the amount due upon the note in both of the foregoing cases and that that amount was the same as the measure of his damage from the tort, did not affect the situation at all; nor did the fact that interest was claimed, affect the situation.

It should be noted that in both of these cases plaintiff was asking for judgment in State courts where waiver of tort would have been proper for the court's consideration.

In the present case, however, we did have a judgment in the State court with a waiver of findings and upon stipulated facts.

Our case is infinitely stronger than the two cases just referred to, because in determining whether a claim based on fraud is dischargeable in bankruptcy as has been shown before herein, the court is not limited to the *form* of the pleading.

One of the clearest State cases on record touching the issues here is

Fred C. Ehnes v. Roger N. Generozzo, 19 N. J. Misc. 393.

This case is so comprehensive as to cover most of the issues here including "*res adjudicata*," "construction of pleadings," "waiver of tort," "estoppel," "examination of

the record," etc. We respectfully urge the Court to examine the details of this case.

Petitioner has cited the case of

Marr v. Superior Court, 30 Cal. (2d) 275,

we refer to the California Supreme Court case of *Wilson v. Walters*, which states that the court in the *Marr* case erroneously relied upon the case of *Crawford v. Burke* (195 U. S. 176) "and is therefore disapproved."

Petitioner refers to the *Crawford v. Burke* case, stating that "it has never been overruled." (Pet. Br. p. 95).

He cites certain cases which have "upheld" the *Crawford v. Burke* case. He overlooks the fact that *Tindle v. Birkett* was started in 1898, prior to the amendment of 1903.

Before 1903 a claim for fraud was not provable unless reduced to judgment. But if such claim could have been based on an open account or on contract, express or implied, it *was* provable. The claim in the *Crawford v. Burke* case was not reduced to judgment when the discharge was granted *and was, therefore, not provable as fraud*.

The entire *Crawford v. Burke* case turned on the provability of the claim in fraud.

But—since 1903 a claim for fraud need not be reduced to judgment to be provable if it is susceptible of proof or definite ascertainment.

The foregoing law shows that the Petitioner's point under consideration in our argument is no longer supported by the prevailing law of the country, particularly, the Federal Courts.

The defendant in the *Tindle* case set up his discharge in bankruptcy as a defense in the lawsuit wherein the plaintiff sought to recover damages for fraud. The claim was not provable as fraud under the law as it then existed. It was, however, provable under contract and was, therefore, dischargeable. The case is not in point here.

Petitioner quotes from *Grant Shoe Co. v. W. M. Laird Co.*, 212 U. S. 445, and in this case we note that the "provable debts" referred to in the quotation is followed by "with certain exceptions," which we submit means, among others, debts based on *fraud*.

Clarke v. Rogers, 228 U. S. 534.

Petitioner's citation omits the Court's comment "that some torts may be waived," etc.

Here again is the same distinction. There is a difference between torts involving *actual fraud* and torts which involve no fraud or which involve constructive fraud only; trover, for instance. On page 548 of the *Clarke v. Rogers* case, the Court further discusses the question raised by appellant and states plainly that the *Crawford v. Burke* case was decided on the test of provability of the debt. We have already shown that provability of the debt in the *Crawford v. Burke* case was determined by the fact that no judgment had been rendered for the alleged fraud.

Schall v. Camors, 251 U. S. 239.

We respectfully submit that the above case does not hold as indicated by Petitioner in his brief. The case does hold as follows in reference to the points stated by the Petitioner:

"Where the tortious act constitutes at the same time a breach of contract, a different question *may be raised, with which we have no present concern.*"

The case of *Kreitlein v. Ferger*, 238 U. S. 21.

This was an action in trover where actual fraud was not involved. Therefore, the law relating to cases of actual fraud is not determined by this citation. We have already stated that where actual fraud is not involved in cases involving tort and contract combined, a discharge might bar the debt.

Standard Sewing Machine Co. v. Kattell, 132 App. Div. (N. Y.) 539.

Petitioner cites this case for some reason to support his position. It does not support it, because here the plaintiff *could have* sued upon an implied contract. The Court in this case holds exactly in harmony with Petitioner's position in the present argument, namely, that the debt is not dischargeable.

We shall now discuss the law as stated by the authors in bankruptcy, following the cases, both Federal and State.

"A judgment, in an action on the contract and involving a waiver of any tort there might have been present, is dischargeable, not so, however, if the action in contract does not involve such an election of remedy as will bar any recovery in tort." (8 C. J. S. 1521.)

Here we cite the case of *Gehlen v. Patterson*, reported in 17 American Bankruptcy Reports, page 131. Among other things, this case decided (decided in 1928):

(1) A creditor's proof of a claim upon a judgment obtained before the debtor's bankruptcy on a promissory note does not prevent the creditor, when suing upon the judgment after bankruptcy, from showing that the loan

for which the note was given was obtained by fraud, and, therefore, not dischargeable.

(2) Neither an action on a note before the debtor's bankruptcy nor action on the judgment after his discharge is an election of remedies which will bar the creditor from showing that the loan for which the note was given was procured by fraud and that the action on the judgment was really an action for fraud in obtaining the loan for which the note was given, and, therefore, not affected by the discharge.

(3) Whatever may be the cause of action sued upon, if it appears that it was from fraud in obtaining the property of the claimant, the liability set forth in the action is not dischargeable, regardless of whether it existed as a provable claim at the date of bankruptcy.

(4) Where the judgment upon which a creditor sues after bankruptcy of a debtor is upon a note given for a loan obtained by fraud of the bankrupt, the discharge will not be a bar.

In its opinion the Court discussed the issues further as follows: Regarding the proof of a claim in one form against the bankrupt's estate as a waiver of remedies in other forms, "The test is not whether the causes of action arise out of the same general subject matter, but whether one action produces a status which necessarily bars the other."

For example, *assumpsit* for the value of converted property confirms the defendant's title so as to bar trover, but an action of deceit in the sale of property confirms the sale so as to bar rescission and the right to return the property and recover its price. "It is the inconsistency of the demands that makes the election of one remedy or

right an estoppel against the assertion of the other, and not the fact that the forms of action are different."

Mrs. Wilson's position that she did not waive the tort has ample support in the Federal cases.

Where a contract action does not involve an election of remedies, but the creditor has a cumulative remedy in tort for obtaining money by false pretenses or representations, the latter liability is not barred by a discharge. (*Collier on Bankruptcy*, 14th Ed., page 1608.)

Proving by a creditor of his claim in bankruptcy does not constitute a waiver of the non-dischargeable character of the debt and a subsequent action in tort for false representations will lie. (*Collier on Bankruptcy*, 14th Ed., page 1608.)

A judgment against bankrupt obtained in an action for money had and received to recover money loaned to the bankrupt as a result of his false and fraudulent representations, as alleged in the complaint, is not dischargeable in bankruptcy. (*In re Stark*, D. C., N. Y., 50 Fed. (2d) 260.)

Although a creditor proved its claim for goods sold and delivered and received a dividend, bankrupt's discharge does not bar a subsequent action in tort for deceit based upon allegations that defendant procured the goods from plaintiff on credit by false representations as to his financial condition. (*Rothchild Bros. Hat Co. v. Stein*, 16 A. B. R., N. S. 476, 1930.)

Creditors, by proving their claims in bankruptcy by contract, do not waive their right and are not precluded

from subsequently suing for the balance in tort in the State Courts. (*In re Menzin* (U. S. Circuit Court of Appeals), 38 A. B. R. 435, 1916.)

Forsyth v. Velmeyer, 177 U. S. 177;

Ames v. Mori, 138 U. S. 306;

Strang v. Bradner, 114 U. S. 555.

We shall not try to answer Petitioner's argument on the California case of *Nathan v. Locke*, 108 Cal. App. 158, for the reason that this Respondent is *not* seeking *contribution* from Petitioner.

None of the cases cited by Petitioner, including the last case mentioned, involved judgments by stipulation or confession.

Judgment by Stipulation.

Petitioner Walters stipulated to judgment by "Confession" and "in accordance with the allegations of the complaint."

The effect of this peculiarly worded stipulation, with its waiver of findings is to:

(a) Cure any defective statement of the cause of action for false representation, there being no question as to jurisdiction, and there being substantial facts and conclusions alleged upon which to base a case.

(b) To give evidentiary value to conclusions of law that they might not have if objected to by demurrer or motion to strike.

(c) To waive all objection to the form of the action, the complaint, to any misjoinder, to any insufficiency excepting as to jurisdiction.

(d) To waive all objection to the form of the judgment.

We must have in mind that this stipulation was signed, *after* an answer had been filed *denying* the fraud. Thus the issue was raised and *settled* by the stipulated judgment.

Any objections to the sufficiency of Respondent's complaint that might have been raised before Petitioner answered were waived by his answer and stipulation for judgment; a judgment by stipulation or consent being the equivalent of a judgment after trial. (*Guaranty Liquidating Corporation v. Board of Supervisors*, 22 Cal. App. (2d) 684.)

"Where a pleading contains an allegation which is not a nullity and largely a conclusion of law and the opposite party, without questioning its sufficiency in a timely manner takes issue thereon and proceeds to trial, the defect is cured."

Western Real Estate Trustees v. Hughes, 172 Fed. 206.

Where there is a plea to merits and all parties go to trial accordingly, irregularities previously set up by pleas in abatement and demurrers to them are waived.

Bell v. Mobile, etc., 71 U. S. 598.

"An omission to plead a material fact is cured by the tender of an issue regarding it by the pleading of the opposite party."

New York Life Ins. Co. v. Rees, 19 Fed. (2d) 781, p. 787.

"When a complaint is not totally devoid of allegation upon a particular point and the objection that it is insufficient in that regard is first made on appeal, the trial having been conducted by the objecting party

upon the theory that it was sufficient, it will be upheld."

Fowler v. Enriquez, 56 Cal. App. 107, 204 Pac. 854.

"Where parties join issue during the trial of a case as though the pleadings presented the issues in question they will be held to have waived the right to object to a deficiency in the pleadings."

Sallee v. Sallee, 63 Cal. App. 54, 218 Pac. 69.

"Notwithstanding there is no direct averment that the fraudulent representations induced the plaintiff to enter into the transaction set forth, yet in the absence of a demurrer, where the same was inferentially averred, the pleading will be held good after judgment."

Nevin v. Gary, 12 Cal. App. 1, 106 Pac. 422.

If the Petitioner Walters claims that the original complaint of Respondent upon which the judgment was based did not state a cause of action for obtaining money by false representations and that therefore this judgment is void, see the following:

"Bad pleas, which are cured by verdict are those which although they would be bad on demurrer, because wrong in form, yet still contain enough in substance to put in issue all of the material facts of the declaration."

Garland v. Davis, 45 U. S. 131.

We claim that the record shows sufficient substance on the issue of fraudulent representations, which, taken with Petitioner's stipulation and with the far-reaching effects of such a stipulation which waives any defects, is ample for all purposes of this proceeding.

Moreover, if the complaint was demurrable for uncertainty, such uncertainty, likewise, was cured by the stipulated judgment.

If the complaint was demurrable because any cause of action on the ground of fraud was stated in the form of legal conclusions rather than by allegations of fact, that defect was likewise cured by the stipulated judgment.

When necessary facts are shown to exist although inaccurately or ambiguously stated, or appearing by necessary implication only, the complaint is sufficient as against a general demurrer or objection on appeal.

21 *Cal. Jur.* 271, with citations.

A judgment is no less conclusive because the matter settled thereby is improperly pleaded if no objection was made at the time.

34 *Corp. Jur.* 776.

In the case of consent judgments such defects are waived.

Again, we ask that serious consideration be given the vital fact that here we have a judgment upon "*the allegations of the complaint.*"

Being a judgment on stipulated facts and by consent *it stands apart* from much of the law cited by the Petitioner Walters. However, so far as the effect of a judgment by consent on defects in the pleadings is concerned, there is ample law.

"AS WAIVER OF DEFECTS OR IRREGULARITIES. A judgment by consent or agreement operates as a waiver of all defects or irregularities in the process, pleadings, or other proceedings previous to the rendition of the judgment, except such as involve the jurisdiction of the court."

34 *Corp. Jur.* 134.

"Tex. Civ. App. Generally, a party cannot complain of a judgment rendered by consent or on agreement and such judgment waives all errors committed before its rendition except errors that involve jurisdiction of the court, and it is not a valid objection that cause of action was so defectively stated as to require reversal had the judgment been rendered on a contest."

Logan v. Mauk, 126 S. W. (2d) 513. error dismissed.

See *Swift & Co. v. United States*, 276 U. S. 311. This case involved a consent decree enjoining the defendants against certain acts. The United States had sued for an injunction and defendants consented to the decree without proof or finding of facts. Later defendants moved to vacate the consent decree on the ground that there was no case or controversy to afford jurisdiction. Denied.

"Error * * * being of a kind reviewable on appeal * * * is waived by consent to the decree."

"Provisions of the consent decree cannot be assailed (5) * * * upon the ground that defendants are restrained in the future from lawful use of business *not connected* by any findings of facts with the conspiracy charged; since consent to entry of the decree without such findings left power in the court to construe the pleadings and therein to find circumstances of danger justifying said prohibitions" (page 328).

Judgment by consent excuses error and operates to end all controversy between the parties. All errors are waived by a consent decree. (*Pacific RR Co. v. Ketchum*, 101 U. S. 289.)

Where a case is submitted on an agreed statement of facts, for such judgment as the law requires, all questions

of the sufficiency of the pleadings are waived. (14 *Cal. Jur.* 878.)

Even if the cause of action for fraud is defectively pleaded, such defect is cured by the judgment. (*Stewart v. Burbridge*, 10 *Cal. App.* 623.)

By stipulation to entry of judgment for plaintiff defendant waives defects in the complaint even as to matters of substance. (21 *Cal. Jur.* 273.)

WAIVER OF FINDINGS.

By his stipulation in the original case the Petitioner waived findings of fact and conclusions of law. The effect of this waiver is manifest. Walters answered the original complaint denying the fraud—before he signed the stipulation. He thus pleaded to the merits.

“When findings are waived, it is presumed that every fact essential to the support of the judgment was proved and found by the court.” (24 *Cal. Jur.* 956, with numerous citations.)

What could have been gained had the Bankruptcy Court chosen to exercise jurisdiction in the Walters bankruptcy matter?

If the Respondent's position is sound in other respects, the Bankruptcy Court could have arrived at but one conclusion as to the dischargeability of the debt—namely, that it is non-dischargeable. Had it followed that course and so ordered, the results for all practical purposes would be the same as they now are.

Dated August 7th, 1944.

Respectfully submitted,

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Counsel for Respondent.

